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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL ENERGY REGULATORY COMMISSION and JAMES B. EDWARDS, SECRETARY OF ENERGY,

Appellants,

—v.—

THE STATE OF MISSISSIPPI, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF OF AMERICAN PAPER INSTITUTE, INC., AMICUS CURIAE

William M. Bradner, Jr.
Rigdon H. Boykin*

CHADBOURNE, PARKE, WHITESIDE & WOLFF
30 Rockefeller Plaza
New York, New York 10112
(212) 541-5800

Attorneys for American Paper Institute, Inc.

*Counsel of Record

Jonathan I. Price
Of Counsel

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BRIEF OF AMERICAN PAPER INSTITUTE, INC., AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The American Paper Institute, Inc. ("API") is the national trade association of the pulp, paper and paperboard industry in the United States. API consists of approximately 170 manufacturers producing 90% of the nation's pulp, paper and paperboard output. This industry is the nation's leader in the self-generation and cogeneration of electric power, accounting for approximately 3,000 megawatts ("MW") or close to 50 percent of all cogeneration in the United States.[1] API is filing

1 Research Planning Associates, Inc., *Outlook for Paper Industry Cogeneration in the 1980's*, (March 24, 1981) at 4, Exhibit 13. API is also a major producer of hydroelectric power for industrial use, having last year generated over 2,400 million kilowatt-hours of electricity.

this brief on behalf of appellants Federal Energy Regulatory Commission and James B. Edwards, Secretary of Energy.

API is interested in the appeal from the judgment of the District Court of the Southern District of Mississippi to the extent that it declared § 210 of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. § 824a-3, unconstitutional. This portion of the Act regulates the terms and conditions under which public utilities purchase and sell electricity from and to cogenerating and small power-producing facilities. It covers an area and presents issues which are independent of the issues involving the constitutionality of Titles I and III of PURPA which involve the regulation of retail rate structures for electricity and gas by state regulatory commissions. API takes no position on the issues involving Titles I and III of PURPA.

Cogeneration Is a Highly Efficient Use of Energy

Cogeneration is the sequential use of energy to produce both electricity and a usable form of thermal energy (such as steam or heat) for industrial, commercial, heating or cooling purposes.[2] Cogeneration in the paper industry normally consists of production of steam under high pressure which is first expanded through a steam turbine to generate electric power and then extracted from the turbine at lower pressures and used in the industrial process for such things as mechanical drives, pulping and drying, bleaching and space heating.

While large public utility generating plants are more efficient in producing electricity than are industrial generating plants which only produce electricity, the sequential reuse of the energy in the cogenerating plant is more efficient overall. A public utility converts 38-39% of the fuel Btu input into electric power. In a typical paper plant, 72% of the total Btu input is used in the manufacturing process and another 10% of the input is converted into electric energy. Thus the paper mill achieves an 82% conversion of available Btu's into useful

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2 18 C.F.R. § 292.202(c).

energy—electric power and process steam—as against only 38% for the utility.[3] The potential savings of oil and gas are compounded when the paper mill uses its own waste products such as bark or spent chemicals from the pulping process as fuel. Today these waste products constitute over 50% of the fuels used at pulp and paper mills.

Exploitation of Industry's Cogeneration Potential Will Result in Significant Benefits to the Nation

The obvious intent of Congress in enacting § 210 of PURPA was to harness the small power production and cogenerating capacity of the industrial sector for the benefit of the nation as a whole.[4] If industrial plants could be induced to enlarge their electric generating capacity beyond their own individual needs for power, additional generating capacity could be obtained at less cost and greater fuel efficiency than if public utilities built new fossil fuel plants.

The Federal Energy Regulatory Commission ("FERC") has projected that the successful implementation of § 210 will induce the development of 3,410 MW of new industrial cogeneration capacity by 1995 of which 835 MW would be added in the pulp and paper industry.[5] This capacity translates into

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3 Put another way, the typical efficient oil-fired utility plant will produce one kilowatt-hour of electric energy for every 10,500 Btu's of fuel consumed. In a typical cogeneration facility at a pulp mill, the production of one kilowatt-hour consumes approximately 5,400 Btu's of fuel. Clark, Robert T., *Theoretical Cogeneration Potential of the U.S. Pulp and Paper Industry* at 3, Exhibit 1 (April, 1978).

4 *See Report of the Senate Committee on Energy and Natural Resources on S. 2114*, No. 95-442, 95th Cong., 1st Sess. 33 (1977).

5 In fact, this estimate of new cogeneration in the pulp and paper industry now appears drastically low. A more recent forecast predicts an increase of 2800 to 3620 MW, more than doubling the industry's present capacity. Resource Planning Associates, Inc., *Expected Industrial Cogeneration Investment in the 1980's* at Exhibits 18, 19 (March 31, 1981). Projects currently under consideration by just four of API's 170 member companies would add over 800 MW of new capacity.

additional fuel savings equivalent to more than 21 million barrels of oil annually. Cogeneration in the commercial sector is expected to add another 2,500 MW of capacity, so that the aggregate fuel savings from § 210 induced cogeneration may approach the equivalent of 37 million barrels of oil annually.[6] This is nearly five days of the nation's oil imports at recent rates.

While economic self-interest has led the paper industry, as well as other groups, to produce electricity for its own use either by means of small power production or by cogeneration, historically there have been several deterrents to the interconnection of industrial power plants to the public utility power grid.[7] One deterrent was the prospect that such industrial power plants would be subject to intrusive and costly regulation by FERC and/or by state public utility commissions. Industrial managements tended to avoid such regulation as a distraction from their main business. A second problem was that public utilities in many areas viewed industrial generating plants as unfriendly competition to their own plants. As a result, public utilities refused either to interconnect with the industrial generating plant or to pay a price for industrial power high enough to make interconnection profitable to industry. In addition, some utilities refused to sell back-up power to plants with cogenerating facilities or else charged a discriminatory price for such service.

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6 "Notice of Finding of No Significant Impact and Notice of Intent to Prepare Environmental Impact Statement," Federal Energy Regulatory Commission Docket Nos. RM 79-54, RM 79-55 at p. 33. The fuel savings figures assume an 85% utilization of industrial cogeneration capacity at a fuel savings of 20-30% over utilities' central generation capacity. *See id.* at p. 15.

7 *See, e.g., Hearings before the Subcommittee on Energy Conservation and Regulation of the Senate Committee on Energy and Natural Resources on S. 122, S. 1300, S. 1363, S. 1364 and S. 1469 (Part E),* 95th Cong., 1st Sess. (September 8, 9, 1977), S. Pub. No. 95-120 Part 2, 385-86 (Statement of Senator Charles Percy on utility opposition to interconnection with small power producers and cogenerators).

Congress enacted § 210 in order to remove these disincentives.[8] The statute directs FERC to prescribe rules which require electric utilities to sell power to and purchase power from qualifying cogeneration and small power production facilities. It directs that the rules insure that the rates for such purchases and sales are "just and reasonable" and "in the public interest" and do not discriminate against the qualifying cogeneration and small power producing facilities. In addition, § 210 empowers FERC to exempt qualifying cogenerating and small power production facilities from most federal and state regulation of rates, financial structure and corporate organization.

The District Court did not refer specifically to § 210 at all in its opinion. However, the Final Judgment declares, among other things, that § 210 in its entirety is "unconstitutional and void." If this judgment were to be upheld, all the prior obstacles to increased cogeneration and small hydroelectric power production would be reinstated. Without an assured market, hydroelectric projects now in the planning stage cannot be financed and will not be built. Cogenerating plants will either not be built or will be reduced in size so as to service the producing plant only. An important element in the nation's drive for energy self-sufficiency will be damaged and possibly lost.

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8 *See, e.g., Hearings before the Subcommittee on Energy Conservation and Regulation of the Senate Committee on Energy and Natural Resources on S. 122, S. 1300, S. 1363, S. 1364 and S. 1469 (Part E),* 95th Cong., 1st Sess. (September 8, 9, 1977), S. Pub. No. 95-120 Part 2, 385-86 (Statement of Senator Charles Percy on utility opposition to interconnection with small power producers and cogenerators).

SUMMARY OF ARGUMENT

The power of Congress under the Commerce Clause of the Constitution extends not only to the regulation of interstate commerce but also to intrastate matters having a substantial effect on interstate commerce. Because of the existence of vast interconnected power grids, purchases and sales of electricity between electric utilities on the one hand and cogenerators and small power producers on the other are either actually in interstate commerce or have a significant effect on that commerce. In addition, the quantity of oil and gas consumed by electric utilities has a direct impact on the amount of petroleum products which must be imported in foreign commerce.

The District Court found that § 210 of PURPA was unconstitutional because it "displace[d] and . . . usurp[ed] the regulatory power and authority of the state of Mississippi." However, § 210 operates primarily on electric utilities, cogenerators and small power producers. Under the Commerce power, Congress may regulate to the full extent of that power entities whose operations affect commerce, and in so doing may preempt the field and exclude the states from any regulatory role over the same subject. This is true even though the states may have previously established an extensive regulatory scheme in the same field. Thus, insofar as regulations promulgated under § 210 of PURPA apply directly to electric utilities, cogenerators and small power producers, they are unquestionably valid as within the regulatory power of Congress under the Commerce Clause.

While § 210 also directs the states to implement the regulations enacted by FERC under § 210 and to give access to state courts for enforcement of such regulations, these provisions of § 210 do not present a controversy which is ripe for decision at this time. All that the FERC regulations require of the states is that they provide a forum where disputes between private parties as to the application of the regulations can be adjudicated. The record does not show that any parties have raised such a dispute in the State of Mississippi nor has Mississippi

expressly refused to adjudicate such disputes. Nor has the State of Mississippi been threatened by any enforcement action either by the FERC or by private parties.

In any event, there is nothing novel or unconstitutional about a requirement that existing state tribunals apply paramount federal law in disputes coming before them, over which they otherwise have jurisdiction. This is no more than state tribunals are required to do under Article VI of the Constitution.

In summary, § 210 of PURPA is constitutional because it does not regulate the State of Mississippi as a state beyond the degree which the Supremacy Clause contemplates. It does not address matters of indisputable state sovereignty because the power of Congress is paramount over private activities which affect interstate commerce. Moreover, it does not impair Mississippi's ability to structure integral operations in areas of traditional functions because it requires only that Mississippi apply federal law in existing tribunals and in matters coming before them under its traditional procedures. Finally, an overriding national interest in national security requires that consumption of imported oil and natural gas be reduced to the greatest extent possible. The interests of states must yield when overriding national interest requires it.

This Court should reject the argument made below that in situations where Congress has the power to regulate intrastate matters because they affect interstate or foreign commerce, Congress must exercise its power fully and provide its own enforcement machinery. It is argued that Congress may not utilize state officers and state tribunals to enforce federal law. In the narrow context of § 210, rigid application of such a principle would have unfortunate results. To achieve its ends, believed to be in an overriding national interest, Congress would have to take over the entire field of electric utility regulation, leaving nothing for the states. This result would give far less scope to local independence and state sovereignty, than the scheme of "cooperative federalism" embodied in § 210 of PURPA.

ARGUMENT

I. CONGRESS HAS THE POWER UNDER THE COMMERCE CLAUSE TO MAKE § 210 OF PURPA APPLICABLE TO PRIVATE PARTIES AND TO SUPERSEDE INCONSISTENT STATE LAWS AND REGULATIONS

The District Court held that Titles I and III and § 210 of PURPA were unconstitutional, concluding that the Constitution did not give Congress "the power or authority to displace and to usurp the regulatory power and authority of the state of Mississippi over these utilities in the exercise of their intrastate functions and duties with respect to their intrastate customers in Mississippi." (Slip op. at 6, February 20, 1981.) When § 210 is analyzed, however, it is immediately evident that the District Court was in error.

As noted above, the primary impact of § 210 falls on electric utilities, not on state governments. Section 210(a) directs FERC to "prescribe . . . such rules as it determines necessary to encourage cogeneration and small power production which rules require electric utilities" to sell power to and purchase from qualifying cogeneration and small power production facilities. It further directs that such rules shall include provisions with respect to minimum reliability of service and limits sales by cogenerators and small power producers to wholesale transactions. It provides that such rules shall be made after consultation with federal and state regulatory agencies and after public notice and opportunity for comment.

In §§ 210(b) and (c), Congress directed that the above-mentioned rules include provisions requiring that the rates paid and charged by utilities in transactions with cogenerators and small power producers be just and reasonable, in the public interest, and nondiscriminatory.

Section 210(b) also limits the rate which a utility may be required to pay for purchased power to its "incremental cost of alternative electric energy," a term which is defined in § 210(d).

In § 210(e) FERC is authorized, again after consultation with state regulatory authorities and others and after public notice and comment, to exempt qualifying facilities from certain provisions of the Federal Power Act, from the Public Utility Holding Company Act and from "State laws and regulations respecting the rates, or respecting the financial or organizational regulation, of electric utilities, or from any combination of the foregoing."

None of the provisions of §§ 210(a) through (e) are even arguably beyond the power of Congress to regulate interstate commerce. Congress may not only regulate intrastate transactions which affect interstate comerce but may displace state regulatory schemes which are inconsistent with federal regulation.[9] If there were any doubt of this principle in recent years, it has been set to rest in the recently decided case of *Hodel* v. *Virginia Surface Mining & Reclamation Association, Inc.*, ____ U.S. ____ (June 15, 1981). There, as here, it was argued that a federal regulatory scheme which impacted on private land use impermissibly interfered with a state's "freedom to make decisions in areas of 'integral governmental functions.' " Mr. Justice Marshall speaking for the majority made short shrift of this position:

> To object to this scheme, however, appellees must assume that the Tenth Amendment limits congressional power to pre-empt or displace state regulation of private activities affecting interstate commerce. This assumption is incorrect. (Slip op. at 23.)

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9 There can be no serious question that purchases and sales of electric power by utilities at least affect interstate commerce. *See Federal Power Commission* v. *Florida Power & Light Co.*, 404 U.S. 453 (1972). Moreover, use of oil and gas by electric utilities affects the supply and price of such hydrocarbon fuels and the amount of such fuels which need to be imported. *See Wickard* v. *Filburn*, 317 U.S. 111 (1942). Appellees in fact concede the power of Congress to regulate purchases and sales of power which affect interstate commerce. Brief of the State of Mississippi and the Mississippi Public Service Commission to the Supreme Court in Support of Their Motion to Affirm at 3.

Thus, to the extent that § 210 directly regulates utilities and exempts qualifying cogenerators and small power producers from state regulation, it is unquestionably constitutional.

II. THE QUESTION WHETHER § 210 OF PURPA UNCONSTITUTIONALLY REGULATES STATES OR THEIR OFFICERS IS NOT RIPE FOR DECISION

The only portions of § 210 which even colorably purport to regulate the activities of the State of Mississippi are §§ 210(f), (g) and (h).

In § 210(f), Congress did provide that beginning one year after FERC had prescribed the rules called for by §§ 210(a) through (c), "each State regulatory authority shall, after notice and opportunity for public hearing, implement such rule . . . for each electric utility for which it has ratemaking authority."[10]

In turn, § 210(g) authorizes both FERC and private parties to bring actions to enforce the FERC rules against utilities, cogenerators and small power producers and to seek judicial review of state proceedings implementing these rules. Section 210(g)(1) provides that such judicial review may be obtained in the manner provided in § 123 of PURPA. Section 123 provides that actions to review determinations made under § 210 may be brought in state court pursuant to applicable state procedures. Section 210(g)(2) provides that any person, including the Secretary of Energy, may bring an action to enforce state requirements with respect to cogeneration established pursuant to § 210(f). Such actions also must be brought pursuant to § 123 of PURPA, which again provides that enforcement actions are to be brought in the state court.

Direct enforcement of the rules issued by FERC pursuant to § 210(a) is provided under § 210(h). Section 210(h)(1) provides

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10 Section 210(f) also provides that any utility which is not subject to state regulation shall implement such rules directly.

that to the extent that FERC has jurisdiction under Title II of the Federal Power Act, it may enforce the rules against the offending utility, cogenerator or small power producer according to the provisions of that Act. Section 210(h)(2)(A) provides that FERC may enforce the provisions of § 210(f), requiring state implementation, against state regulatory authorities as if that section were a rule under the Federal Power Act. Section 210(h)(2)(B) provides that private parties may petition FERC to enforce §210(f) and if it does not do so, authorizes such parties to "bring an action in the appropriate United States district court to require such State regulatory authority. . . to comply with such requirements, and such court may issue such injunctive or other relief as may be appropriate."

FERC has now issued its rules implementing § 210. These rules have been codified at 18 CFR § 292. Subpart C of Part 292 embodies the rules which establish the fundamental arrangements between cogenerators and utilities, including rates for purchases and sales, obligations to provide back-up services and interconnection requirements.

With respect to implementation by state regulatory bodies under § 210(f), 18 C.F.R. § 292.401 provides in pertinent part:

> Not later than one year after these rules take effect, each State regulatory authority shall . . . commence implementation of Subpart C . . . . Such implementation may consist of the issuance of regulations, *an undertaking to resolve disputes between qualifying facilities and electric utilities arising under Subpart C,* or any other action reasonably designed to implement such subpart . . . . (Emphasis added.)

The rule also requires that within one year after the effective date of the rule:

> . . . each State regulatory authority. . . shall file with the Commission a report describing the manner in which it will implement Subpart C . . . .

Finally, § 292.403 provides that any state regulatory authority may apply for a waiver from the application of any of the requirements of Subpart C. Such waiver will be granted by FERC if it is shown that compliance with a requirement of Subpart C is not necessary to encourage cogeneration and small power production and is not otherwise required under § 210 of PURPA.

The foregoing analysis demonstrates that § 210, as implemented by FERC, requires virtually no action on the part of the Mississippi Public Service Commission at the present time. All that the Public Service Commission is required to do under § 292.401 is to report to FERC that it is willing to resolve disputes between qualifying facilities and electric utilities arising under Subpart C of the FERC rules. If no dispute arises, nothing more will be required of the Mississippi Public Service Commission under § 210. Even if it is required to resolve a dispute, it may be able to obtain a waiver.

Similarly, if the Mississippi Public Service Commission decides not to make any report to FERC, or even reports that it is unwilling to apply the mandates of § 210 and the FERC rules to utilities subject to its jurisdiction, any enforcement action is discretionary with FERC.[11] Even though private parties have authority under § 210(h)(2)(B) to bring action against the Public Service Commission in United States district court if FERC does not bring its own enforcement action, there is no certainty that this will occur. Indeed, the record fails to reveal that there is any private party standing ready to bring such an action.

The impact on the State of Mississippi itself is even more remote. The only provisions of § 210 which affect the state are

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11 In fact, even as it has prosecuted this action, the Mississippi Public Service Commission has voluntarily proceeded with its implementation of the FERC rules. As of August 25, 1981, the Commission has accepted written comments from all interested parties, retained expert consultants and anticipates holding full hearings beginning in late September.

those of § 210(g) which provide that the rules implementing § 210 may be enforced in state courts under state rules of procedure. No such action is pending or was even possible since state rules implementing § 210 were not yet required to be in effect when the action was brought.

This recital indicates that the controversy with respect to the application of § 210 to the State of Mississippi and the Mississippi Public Service Commission is not ripe for decision. The situation is governed by the principle of *Toilet Goods Association, Inc.* v. *Gardner,* 387 U.S. 158 (1967). There the issues presented were held inappropriate for judicial decision because the precise application and impact of the regulations under review were conjectural. As Mr. Justice Harlan put it:

> The regulation serves notice only that the Commissioner *may* under certain circumstances order inspection of certain facilities and data, and that further certification of additives *may* be refused to those who decline to permit a duly authorized inspection until they have complied in that regard. At this juncture we have no idea whether or when such an inspection will be ordered and what reasons the Commissioner will give to justify his order. (387 U.S. at 163, emphasis in original.)

The same considerations of uncertainty and conjecture apply here.[12] The question of what constitutes impermissible federal intrusion on state sovereignty is one of degree. As discussed in Point III, *infra,* a requirement that the states apply federal law in resolving disputes between utilities and cogenerators would not violate the Tenth Amendment. Yet, FERC, in its rules, has indicated that it will require nothing more of the states.

12 In this regard, *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967), is readily distinguishable from the instant case. In *Abbott,* which involved a pre-enforcement challenge to an agency rulemaking as being in excess of statutory authority, the issue tendered was a purely legal one. As such, there was little to be gained from postponing review until a concrete factual controversy arose. As discussed, *infra,* however, the case at bar presents inherently factual issues relating to the application of the statute, which can only be resolved in the context of a concrete case.

Appellee's mere speculation that FERC may seek to impose a greater burden on them in the future only serves to emphasize the unfocused nature of the controversy.

In addition, the Mississippi Public Service Commission has yet to take a position as to whether it wishes to encourage cogeneration and small power production and if so how it desires to do so. It may be that on consideration the Mississippi Commission will find the rules under § 210 to be satisfactory. Or it may devise a variant to the rules which would entitle it to a waiver under § 292.403 of the FERC rules. In either event there would be no occasion for an enforcement confrontation between FERC and the Mississippi Commission. Indeed, even if the Mississippi Commission should be totally recalcitrant, it may be that there are so few potential cogenerators and small power producers in Mississippi or such an excess of utility generating capacity that FERC in its discretion would take no action.[13] These considerations are not resolved on the present record. Determination of the constitutionality of PURPA § 210 under these circumstances "involves too remote and abstract an inquiry for the proper exercise of the judicial function." *International Longshoremen's and Warehousemen's Union* v. *Boyd*, 347 U.S. 222, 224 (1954).

Similar considerations apply with respect to the Mississippi state courts. No case has been or yet can be brought under § 210 in the Mississippi courts. Nor has any showing been made how § 210 would infringe on the prerogatives of the Mississippi courts. For all that appears, the rights granted under § 210 may be redundant to the rights of parties already provided under Mississippi law.

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13 While members of the Mississippi Public Service Commission might, in the abstract, be risking criminal proceedings and civil penalties for recalcitrance, *see* PURPA § 210(h), the mere existence of such extreme sanctions does not establish ripeness when there is no realistic likelihood that prosecution may actually result. *Golden* v. *Zwickler*, 394 U.S. 103 (1969); *Poe* v. *Ullman*, 367 U.S. 497 (1961); *see also Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 n.29 (1974).

Since the only colorable constitutional issue under § 210 was not ripe for decision, the District Court should not have addressed itself to such issues and its judgment should be reversed.

III. UNDER THE SUPREMACY CLAUSE OF THE CONSTITUTION, STATES ARE REQUIRED TO APPLY APPLICABLE FEDERAL LAW IN STATE TRIBUNALS. THIS IS THE ONLY ACTION REQUIRED OF STATES BY § 210 OF PURPA

As described above, § 210 of PURPA requires only two substantive acts of the states in their capacity as states.[14] It requires state regulatory authorities to "implement" the cogeneration rules established by FERC, which duties can be satisfied under the FERC rules by merely undertaking to resolve disputes between qualifying facilities and electric utilities arising under the rule. 18 C.F.R. § 292.401(a). It also requires state courts to entertain appeals and enforcement actions brought in connection with the cogeneration rules.[15]

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14 It is assumed that state and municipally owned utilities and cogenerating plants are subject to regulation under PURPA to the same extent as private plants. *Parden* v. *Terminal R. Co.*, 377 U.S. 184 (1964); *California* v. *Taylor*, 353 U.S. 553 (1957); *United States* v. *California*, 297 U.S. 175 (1936). *Cf. City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

15 18 C.F.R. § 292.401(c) requires state regulatory authorities to report to FERC as to the manner in which the FERC rules will be implemented. This requirement apparently could be satisfied by a simple letter response. Moreover, limited reporting requirements imposed on states have been held not to transgress the limits of state sovereignty as defined in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). *See California* v. *Blumenthal*, 457 F. Supp. 1309 (E.D. Ca. 1978), *rev'd on other grounds sub nom., Deukemejian v. Regan*, 641 F.2d 721 (9th Cir. 1981) (annual ERISA information forms); *Colorado* v. *Veterans Administration*, 430 F. Supp. 551 (D. Colo. 1977), *aff'd*, 602 F.2d 926 (10th Cir. 1979), *cert. denied*, 444 U.S. 1014 (1980) (requirement that educational institution report changes in student status within thirty days).

While these two duties do affect the State of Mississippi "as a State," they involve nothing more than application of federal law in a state tribunal. This the states have the duty to do under Article VI of the Constitution which provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Any doubt that state tribunals were required to recognize federal legislation governing the right of private parties was resolved in *Mondou* v. *New York, N.H. & H.R. Co.*, 223 U.S. 1 (1912).[16] That case, which in many respects is analogous to the case at bar, involved the duty of state courts to entertain actions under the Federal Employer's Liability Act. The Connecticut courts had refused to accept such jurisdiction because it was not in accord with the state's own policies regarding employer's liability. Speaking for a unanimous Court, Mr. Justice Van Devanter said:

> The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature, and should be

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16 It is well established that the Supremacy Clause applies not only to Congressional legislation, but also to Presidential executive orders, *Fry* v. *United States*, 421 U.S. 542 (1975), and administrative regulations, *Public Utilities Comm.* v. *United States*, 355 U.S. 534 (1958); *Leslie Miller, Inc.* v. *Arkansas*, 352 U.S. 187 (1956); *Case* v. *Bowles*, 327 U.S. 92 (1946); *Standard Oil Co.* v. *Johnson*, 316 U.S. 481 (1942).

respected accordingly in the courts of the State. As was said by this court in *Claflin* v. *Houseman*, 93 U.S. 130, 136, 137:

'The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. The United States is not a foreign sovereignty as regards the several States, but is a concurrent, and, within its jurisdiction, paramount sovereignty. . . . If an act of Congress gives a penalty [meaning civil and remedial] to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a state court. The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the state laws. The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent. . . .' (223 U.S. at 57-58.)

This overriding principle was reiterated in *Testa* v. *Katt*, 330 U.S. 386 (1947) which held that a state court was even required to entertain a suit for a penalty established under federal law.

It is likewise the case that state administrative officers can be required to carry out federal law in the performance of their regularly assigned duties. This principle was settled over a century ago in *Ex Parte Siebold*, 100 U.S. 371 (1879), which upheld the power of Congress to punish state officials for failing to carry out federal election laws. In that case Mr. Justice Bradley distinguished *Kentucky* v. *Dennison*, 65 U.S. (24 How.) 66 (1861), relied on by respondents below, on the

ground that Congress had there imposed a duty on the governor of the state which it had no right to impose. Where the power was clear, however, the Court had no hesitancy in holding that state officials were required to obey.

When Congress in § 210 directed state regulatory authorities to implement rules which FERC unquestionably had the power to impose on private parties, it was doing no more than requiring that federal law be applied, when applicable, in a state tribunal. Similarly, when Congress directed in § 210(g) that certain review and enforcement remedies be available in state court under state procedures, it merely made explicit a requirement which was already implicitly present under the doctrine of the *Mondou* and *Testa* cases.

IV. IN § 210 OF PURPA CONGRESS HAS RESPONDED TO A COMPELLING NATIONAL INTEREST IN A MANNER WHICH IS MORE COMPATIBLE WITH TRUE FEDERALISM AND STATE SOVEREIGNTY THAN FULL CONGRESSIONAL PREEMPTION

Respondents, both below and in this Court, have relied heavily on a series of cases in the Circuit Courts holding invalid certain regulations of the Environmental Protection Agency promulgated under § 110 of the Clean Air Act, 42 U.S.C. § 7410. These cases are *Maryland* v. *EPA*, 530 F.2d 215 (4th Cir. 1975), *vacated sub nom., EPA* v. *Brown*, 431 U.S. 99 (1977); *District of Columbia* v. *Train*, 521 F.2d 971 (D.C. Cir. 1975), *vacated sub nom., EPA* v. *Brown*, 431 U.S. 99 (1977), *reinstated in part and remanded in part sub nom., District of Columbia* v. *Costle*, 567 F.2d 1019 (D.C. Cir. 1977); *Arizona* v. *EPA*, 521 F.2d 825 (9th Cir. 1975), *vacated sub nom., EPA* v. *Brown*, 431 U.S. 99 (1977), *reinstated in part*, 566 F.2d 665 (9th Cir. 1978). This court had granted certiorari in all four cases, but vacated and remanded the cases when the Solicitor General conceded that the regulations would have to be amended. 431 U.S. at 103-04.

These cases in general involved the right of the Administrator of the EPA to impose upon the states transportation plans which required the states to enact regulations, purchase buses and devise and conduct testing programs. In each case, the Circuit Courts found that the Administrator's actions were not authorized by the statute, but each Circuit also questioned whether Congress had the constitutional power to enact a statute which authorized such actions.[17] As the District of Columbia Circuit put it, "[T]he exercise of federal power based solely on the commerce clause, cannot against a state's wishes compel it to become involved in administering the details of the regulatory scheme promulgated by the [EPA] administrator." *District of Columbia* v. *Train, supra,* 521 F.2d at 992.

These cases are distinguishable not only because they were decided on statutory, not constitutional, grounds, but because the regulation of states attempted there was far more pervasive and intrusive than is required under § 210 of PURPA. In those cases, EPA had directed the states:

> (1) to develop an inspection and maintenance program pertaining to the vehicles registered in the affected Air Quality Control Regions, and to submit to the Administrator, by fixed deadlines, both a schedule of compliance and the operative regulations by which the program was to be run; (2) to develop various retrofit programs pertaining to several classes of older vehicles, in order to minimize several different types of emissions; (3) to designate and enforce preferential bus and carpool lanes, on streets sometimes specifically identified in the regulations and sometimes left to be chosen by the State; (4) to

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17 Note that on similar facts, the Sixth Circuit held that states *could* constitutionally be required to enforce an EPA-promulgated air quality implementation plan because of the strong federal interest in controlling air pollution. *United States* v. *Ohio Department of Highway Safety,* 635 F. 2d 1195 (6th Cir. 1980), *cert. denied,* ___ U.S. ___, 101 S. Ct. 2031 (April 27, 1981). *See also infra* at p. 22.

> develop a program to monitor actual emissions as affected by the foregoing programs; and (5) to adopt certain other programs which varied from State to State. (*EPA* v. *Brown*, 431 U.S. at 101.)

Such EPA regulations went well beyond the simple adjudication of disputes required under § 210 of PURPA. Under § 210, all the states are required to do is to apply specific rules promulgated by FERC. In the EPA cases, on the other hand, the states themselves were required to develop the regulations including devising techniques for testing and monitoring the effect of automobile emissions.

The test for determining whether a federal statute or regulation which impinges upon the states oversteps the power of Congress to regulate commerce was succinctly described in *Hodel* v. *Virginia Surface Mining & Reclamation Association*, ____ U.S. ____ (June 15, 1981):

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the States as States.' . . . Second, the federal regulation must address matters that are indisputably 'attributes of state sovereignty.' . . . And third, it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional functions.' (Slip op. at 21, emphasis in original.)

As the majority opinion notes in a footnote (slip op. at 21 n.29), even if these three tests are satisfied, an overriding national interest may nevertheless justify a particular regulation of state activities.

Appellees cannot meet their burden on any of the three *Hodel* requirements. As demonstrated in Point I, *supra*, the

parties regulated are electric utilities, cogenerating facilities and small power production facilities. The State of Mississippi is not regulated as a state except insofar as the Supremacy Clause permits it to be regulated by requiring the state to recognize and give effect to federal law in its tribunals.

Neither does § 210 address matters that are indisputably matters of state sovereignty. While regulation of public utilities by the states is unquestionably permissible under their police power in the absence of federal regulation, nevertheless Point I, *supra,* makes clear that Congress has the power under the Commerce Clause to preempt the regulation of utilities altogether. Thus, regulation of utilities is not an essential ingredient of state sovereignty.

Finally, § 210 in no way impairs Mississippi's ability "to structure integral operations in areas of traditional functions." No state is required to create a public utility commission if it doesn't already have one because § 210 provides for direct regulation by FERC of unregulated utilities.[18] Nor does § 210 compel Mississippi to organize its Public Service Commission in any particular way or to devise regulations or to perform research or do anything other than perform its normal regulatory functions.[19] All that § 210 does is to require that the Mississippi Public Service Commission apply federal cogeneration rules in carrying out its normal functions. Similarly, § 210(g) does not affect Mississippi's court procedure or require it to restructure its courts in any way. It merely requires

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18 Of course, Mississippi already has a Public Service Commission, co-appellee in this action, which has been in existence in its present form since 1938 and has had jurisdiction over electric utility regulation since 1956.

19 Appellees rely heavily here, as in the District Court, on the argument that implementation of PURPA will put a heavy fiscal burden on the state. As this Court recognized just two months ago in *Hodel* v. *Virginia Surface Mining & Reclamation Assoc.*, ___ U.S. ___ (June 15, 1981), however, "this kind of effect, standing alone, is insufficient to establish a violation of the Tenth Amendment." (Slip op. at 26 n.33.)

Mississippi courts to apply federal law in cogeneration disputes.

In light of the gravity of the problem to which PURPA and the National Energy Act are a response, this minimal intrusion into state sovereignty cannot be objectionable. As Justice Blackmun noted in his concurring opinion in *National League of Cities* v. *Usery*, 426 U.S. 833, 856 (1976), the doctrine of that case "does not outlaw federal power in areas . . . where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."

Section 210 of PURPA is an exercise of power in just such an area. In his message to the nation in which he introduced his energy plan, including the forerunner of PURPA § 210, President Carter called the energy crisis "the greatest challenge that our country will face during our lifetime . . . the moral equivalent of war." (President Carter's Address to the Nation April 18, 1977, reprinted in *Executive Energy Documents*, S. Pub. No. 95-114, 95th Cong., 2d Sess. at 387 (July 1978).) Two nights later in an address to a joint session of Congress, the President stated that the program was "carefully balanced . . . depending for its fairness on all its major component parts." (Id. at 399.) Congress, too, recognized that "[t]he National Energy Act represents an effort to adopt a comprehensive set of policies" to deal with the energy crisis. (*Report of the House Committee on Energy*, House Rep. No. 95-543, 95th Cong., 1st Sess. at 8 (1977).) Moreover, as discussed *supra* at pp. 3-5, Congress' obvious intent in enacting § 210 of PURPA was to take advantage of the significant fuel savings and concomitant decreased national dependence on foreign oil promised by the fullest practical development of the nation's cogeneration and small power production potential. Thus, PURPA § 210 is an integral element of a program vital to the future well-being of the nation, and the burden it imposes on the states is justifiable.[20]

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20 See *United States* v. *Ohio Department of Highway Safety*, 635 F.2d 1195, 1205 (6th Cir. 1980), *cert. denied*, ___ U.S. ___, 101 S. Ct.

(Footnote continued on following page)

Respondents below pressed the principle enunciated in several of the *EPA* cases, *supra*, that where Congress has the power to preempt regulation of an activity under the Commerce power, it cannot involve a state in the regulatory process without its consent. Citing statements in *District of Columbia* v. *Train*, *supra*, 521 F.2d at 992, respondents argue that if Congress wishes to regulate certain aspects of an area such as retail sales of electricity, it must take over public utility regulation in its entirety. It cannot lay down rules for specific areas of utility regulation, leaving the states free to implement those rules in the context of their own regulatory policies on other matters.

With due respect, this reasoning leads to throwing the baby of federalism out with the bathwater. Rather than leaving states with a maximum role to play in regulating their own economies consistent with overriding national need, an "all or nothing" rule such as that enunciated by the District of Columbia Circuit would inevitably result in far greater federal impingement on traditional state roles than the cooperative federalism which is established in § 210.

This Court has implicitly rejected the "all or nothing" argument in *Hodel* v. *Virginia Surface Mining & Reclamation Association*, *supra*, where the Court said:

> Thus, Congress could constitutionally have enacted a statute prohibiting any state regulation of surface coal mining. We fail to see why the Surface Mining Act should become constitutionally suspect simply because Congress chose to allow the States a regulatory role. (Slip op. at 24.)

It would be most unfortunate for the future of "cooperative federalism" if this Court should retreat from the doctrines of

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(Footnote continued from preceding page)

2031 (April 27, 1981) ("[A] scheme which seeks to enforce state cooperation in an effort to deal with a national problem will not fall under the proscription of the Tenth Amendment if it leaves the states free to make choices which are essential to their functions as states.").

Mondou and *Testa* and block a less pervasive form of federal regulation in favor of one which would be all-pervasive in its field. While clearly, as this Court held in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), there are limits beyond which Congress cannot go under the Commerce Power, the beneficial results which flow from permitting Congress to assign a continuing regulatory role to the states should not be sacrificed on the altar of an ideologically pure concept of state sovereignty.

CONCLUSION

Section 210 of PURPA does not exceed the power of Congress to regulate commerce. The judgment below, insofar as it declares § 210 to be unconstitutional and void, should be reversed.

Respectfully submitted,

William M. Bradner, Jr.
Rigdon H. Boykin*

CHADBOURNE, PARKE, WHITESIDE & WOLFF
30 Rockefeller Plaza
New York, New York 10112
(212) 541-5800

Attorneys for American Paper Institute, Inc.

*Counsel of Record

Jonathan I. Price
Of Counsel

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